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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner

v.

WALTER BACHOWSKI

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE FOR THE ASSOCIATION FOR UNION DEMOCRACY, INC.

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BRIEF AMICUS CURIAE FOR THE ASSOCIATION FOR UNION DEMOCRACY, INC.

STATEMENT OF INTEREST

The Association for Union Democracy, Inc. is a non-profit corporation registered in the State of New York in 1969. [Granted tax-exempt status by the Internal Revenue Service in January 1971; and subsequently classified by the IRS as a non-private foundation.] The aim of the Association, as stated in its certificate of incorporation, is to further democratic principles and practices in American labor organizations both by encouraging union members to participate actively in the internal life of their union and by protecting the exercise of their democratic rights within

their union. In establishing the Association, its founders were motivated by the realization that no other citizens organization devoted itself primarily to this objective.

The Association does not take sides in internal union disputes over policy, program, or candidates. But it does propose that the rivalries and antagonisms which arise in the labor movement, as in other social institutions, be resolved on the basis of democratic procedures and due process.

The sponsors of the Association include persons who are or have been known leaders of major unions, religious leaders concerned with social justice, members of union public review boards, lawyers, prominent educators in workers education in labor law. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which help sustain democracy in our national life, and that if it is to serve this purpose most effectively, union leaders must be responsive to their members and unions must be democratic in their internal life.

One of the primary concerns of the Association has been in promoting and protecting the democratic process in union elections as the most crucial single element of union democracy. The Association has recognized that in some unions fair and honest elections can be secured only through the intervention of the law to protect democratic rights. The vitality of union democracy in such unions depends on the availability of effective legal protection.

Under the LMRDA the Secretary of Labor is assigned a heavy responsibility for protecting fair union election procedures. Once an election has been held,

he is the sole recourse of union members whose rights to a fair election have been denied. The present case raises the critical issue how the Secretary will fulfill that responsibility and whether he can be required to provide union members the protection the statute guarantees. How this case is decided will vitally affect the work of the Association and the values it seeks to promote.

The Association presents this brief in support of Mr. Bachowski with the consent of counsel for all parties.

STATEMENT OF THE CASE

Respondent Walter Bachowski was a candidate for the office of District Director of District 20 of the United Steelworkers of America in an election held on February 13, 1973. He was defeated in that election by 907 votes out of approximately 24,000 votes cast. After exhausting his remedies within the union, he filed a timely complaint with the Secretary of Labor on June 21, 1973, alleging numerous violations of the union constitution and Section 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

Following an investigation of this complaint, the Secretary on November 5, 1973, notified Bachowski by telephone that he had decided not to file suit to set aside the election. No explanation was given why the suit would not be filed.

Respondent thereupon brought suit against the Secretary and the union, seeking to compel the Secretary to file suit to set aside the election. The complaint alleged, *inter alia*, that the Secretary's investigation

had substantiated the alleged charges of election irregularities and that those irregularities had affected the outcome of the election, but notwithstanding this the Secretary had refused to set aside the election and had failed even to inform Bachowski of his reasons for that refusal.[1]

The district court dismissed the complaint for lack of jurisdiction over the subject matter. The court of appeals reversed, holding that the district court had federal court jurisdiction and that the Secretary's decision not to bring suit to upset a union election under Section 402 of LMRDA was subject to judicial review. *Bachowski* v. *Brennan,* 502 F.2d 79.

SUMMARY OF ARGUMENT

The Secretary contends that he has absolute discretion to refuse to bring suit to set aside a union election even though his own investigation has shown that violations of Title IV of the LMRDA have affected the outcome of that election. That contention is contrary to the intention of Congress, derogates from the rights guaranteed by Title IV, and undermines the purposes of the Act.

The Secretary was charged by Congress with the responsibility of enforcing the rights guaranteed by Title IV to assure fair and democratic rights. Those rights are basic democratic rights in which the public has an interest, but they are also fundamental individual rights of union members. After an election

[1] The statement of reasons attached as an appendix to Petitioner's brief was submitted to the district court more than a year later and in compliance with an order of the court of appeals in the case now being appealed.

those rights can be enforced only through the Secretary. His insistence on absolute discretion to refuse to sue is assertion of an unreviewable power to deprive members of their basic democratic rights. This is clearly not the role contemplated by Congress when it made his suit the exclusive remedy for challenging an election.

The Secretary was intended by Congress to serve three functions. First, he was to serve as the union member's lawyer to protect the members' rights which they might be unable to protect themselves. Second, he was to serve as a screen to protect unions from frivolous suits where there was no probable cause to believe that violations had occurred or the violations were technical and could not have affected the outcome of the election. He was not to protect unions from meritorious suits where there were grounds for setting aside the election. Third, the Secretary's suit was to consolidate in a single suit all meritorious complaints challenging the validity of the election. None of these functions justifies, much less requires, that the Secretary have absolute discretion to refuse to bring suit where meritorious claims that violations of Title IV rights have affected the outcome of the election.

The words of Section 402(b) impose a positive mandate on the Secretary. He "shall investigate," and if he finds probable cause, "he shall . . . bring a civil action." Throughout the legislative history his responsibility was expressed in mandatory terms. Nowhere in the legislative history is there any suggestion that he could or would refuse to sue where his investigation showed probable cause that violations may have affected the outcome. His discretion was limited to

weighing the evidence and predicting the likelihood of success in the litigation.

The motivating purpose of Title IV was to make union officers responsive to the desires of their members. This purpose is fulfilled only when members who are dissatisfied with union policies and leadership make use of the democratic processes protected by Title IV. But challenging incumbent officers in an election is exceedingly difficult, often costly, and sometimes dangerous. The willingness of dissatisfied members to undertake these burdens and risks depends on their confidence that their rights under Title IV will be protected and that they will be guaranteed a fair and democratic election. Appealing to the Secretary to set aside an unfair election carries added costs and risks. If dissatisfied members, having traveled that long and perilous road, can be told that even though violations of their rights have cheated them of victory, the Secretary has absolute discretion whether to obtain for them a fair election, they will be discouraged from exercising the rights Congress sought to protect, and they will not appeal to the Secretary for protection of those rights. Vitality of the democratic process depends on confidence in the Secretary's decisions. That confidence requires judicial review of his decisions not to sue so members have assurance from a court that his decisions are not arbitrary and are in accordance with law.

ARGUMENT

I

The Secretary of Labor's Refusal to Bring Suit to Set Aside a Challenged Union Election Is Not Immune From Judicial Review to Determine Whether That Refusal Was Arbitrary Or Was Not in Accordance With the Law

The contention of the Secretary, stated simply, is that he has absolute discretion to refuse to bring suit to invalidate a union election even though his own investigation has substantiated that the charged violations of Title IV affected the outcome of that election. The Respondent's complaint alleges:

> "18. Notwithstanding the fact that the Defendant Secretary's investigation has substantiated the plaintiff's allegations and notwithstanding the fact that the irregularities charged affected the outcome of the election, the Defendant Secretary refuses to file suit to set aside the election." (Appendix, P. A5)

The Secretary's position is that even though this is true, the district court has no authority to review his action and he is answerable only through the political process (Petitioner's brief, p. 30). He insists that his action is immune to judicial scrutiny in the face of this Court's clear declaration that—

> "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.: *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140.[1]

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[1] See, *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410; K. Davis, ADMINISTRATIVE LAW TREATISE (1970 Supplement) §§ 28.08, 28.16; L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 336, 372 (1965).

There is no substantial reason to believe that Congress intended to give the Secretary absolute discretion to determine whether or not to bring suits to set aside elections conducted in violation of the Act. On the contrary, the nature of the rights to be protected by a suit to set aside an invalid election, the role of the Secretary in bringing such suits, and the limited discretion explicitly recognized by Congress all point in the opposite direction. They all provide persuasive reasons to believe that Congress did not intend to preclude judicial review.

A. *The Nature Of The Rights Protected By The Secretary's Suit To Set Aside An Election*

Protection of the right to free and fair elections is central to the Congressional purpose of insuring the "responsiveness of union officers to the will of their members." S. Rep. No. 187, 86th Cong., 1st Sess. 20 (1959). To guarantee this central right, Title IV protects a wide range of democratic rights—the right to vote and to have votes counted honestly, the right to nominate and to support candidates of one's choice, the right to run for union office and to distribute campaign literature. LMRDA § 401. The exercise of these rights encompasses even more fundamental rights of freedom of speech, freedom of assembly, and the right to participate equally in union affairs guaranteed by Title I.

These rights guaranteed by Title IV are not purely public rights but are individual rights of union members. When the Secretary brings suit to set aside an election, under Section 402, he serves two distinct interests. He protects the "vital public interest in assuring free and democratic union elections," *Wirtz* v.

Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 475 (1968). He also acts on behalf of the individual union member to protect his rights in the union. *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528, 538-9 (1972).

If the Secretary refuses to sue when violations of the Act have affected the outcome of the election, both the public interest in fair and democratic union elections is sacrificed, and the rights of union members to choose their officers and thereby influence the policy and leadership in the union are destroyed. For under Section 403, the exclusive remedy for challenging an election is a suit by the Secretary; after the election has been held, he becomes the sole avenue for protecting and vindicating the rights guaranteed by Title IV. If he refuses to bring suit, both the public interest and the rights of union members go unprotected and unvindicated.

There is no persuasive reason to believe that Congress intended to give the Secretary absolute discretion to sacrifice this central public interest in fair and democratic elections when he deemed it was outweighed by other public interests. There is even less reason to believe that Congress intended to give him unreviewable discretion to ignore and destroy basic democratic rights of individual union members, rights which Congress labored so long and hard to guarantee.

Furthermore, after an election a union member's preexisting rights under state law to enforce the union's constitutional provisions relating to the election can be enforced only through a suit by the Secretary.[8] If the Secretary arbitrarily refuses to bring

[8] Prior to the conduct of an election, existing rights and remedies to enforce the constitutional provisions may be brought by a union

suit, the union member will lose those rights to a fair election which he had before the statute was enacted. This result would be directly contrary to the clear purpose of Congress not to supplant existing rights of union members to a fair election, but to add to those rights and to place on the Secretary the responsibility for enforcing those rights after an election had been conducted.[4]

B. *The Role of the Secretary in Enforcing Rights Guaranteed by Title IV*

The legislative history of Title IV discloses three distinct reasons the Secretary was charged with responsibility for enforcing Title IV rights, and those reasons prescribe the role Congress intended him to play in enforcing those rights. No aspect of his role justifies, much less requires, that he have absolute discretion to determine whether or not to bring suit to set aside a challenged election.

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member in the state courts. Section 403, S. Rep. No. 187, 86th Cong., 1st Sess., 21 (1959).

[4] In discussing the enforcement provisions of what is now Title IV, Senator Wiley and Senator Kennedy engaged in the following colloquy:

> SENATOR WILEY. So I understand that the bill does not attempt to interfere with a member's present rights with relation to a union or union members who may invade his rights, along the lines suggested in the two recent decisions.
>
> SENATOR KENNEDY. The Senator from Wisconsin is entirely correct.
>
> SENATOR WILEY. The bill simply gives additional rights, as I understand——
>
> SENATOR KENNEDY. Yes; that is correct.
>
> SENATOR WILEY. In order that the Secretary of Labor can look after the member's rights in the case of such elections in unions, and in cases of trusteeship, and so forth. Is that correct?
>
> SENATOR KENNEDY. Yes. 104 Cong. Rec. 10947 (1958).

First, the Secretary is to serve as "the union member's lawyer," protecting the rights of union members which they are unable to protect themselves. *Trbovich* v. *United Mine Workers of America, supra,* 404 U.S. at 539.

S.3974, which had enforcement provisions substantially the same as those enacted in Section 402, was reported out of the Senate Committe eon Labor and Public Welfare on June 10, 1958 (S.Rep.No. 1684, 85th Cong., 1st Sess.), and after extensive debate was passed by the Senate on June 17, 1958. During that debate, Senator Kennedy emphasized that the reason for enforcing Title IV rights through suits brought by the Secretary was to provide a more effective remedy than suits by union members in state courts. He cited as a "classic example" the case of members of the Teamsters who brought suit to challenge the election of James Hoffa. After months of litigation, they had to accept a settlement which was highly unsatisfactory, and then were confronted with a lawyer's bill for $300,000. Senator Kennedy then underlined the role of the Secretary in these words:

> "In the bill we provide the right of appeal to the Secretary of Labor, whenever a member believes that his rights, as provided in the bill in the case of an election, have been denied him. Then the Secretary of Labor in effect becomes the union member's lawyer." 104 Cong. Rec. 10947 (1948).

Later in the same colloquy he reemphasized the reason for giving this responsibility to the Secretary:

> "In the case of elections, the Bill gives the Secretary of Labor authority—and we expect him to enforce this Section—to set aside any election in which a member is denied his rights, whereas at

> the present time a member is not given that right, and cannot obtain it and cannot afford to carry a case to the state court." *Ibid.*

S.3974 was defeated in the House, and on January 20, 1959, Senator Kennedy introduced S.505, which contained essentially the same enforcement provisions. In the hearings on S.505, Professor Cox, who was a principal consultant to the draftsmen, described the election enforcement provisions as similar to those to lift improper trusteeships. Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on Labor-Management Reform Legislation, 86th Cong., 1st Sess. 134. In explaining the reasons for placing enforcement of those provisions in the hands of the Secretary, he said:

> "individual workers, for reasons already mentioned, are unwilling or unable to sue an international union. . . . There is ample precedent for authorizing a government agency to bring action for the protection of particular classes of persons unable to protect themselves." Hearings at 132.

When the House Committee on Education and Labor reported out H.R. 8342 (H.Rep.No. 741, 86th Cong., 1st Sess.) it provided for enforcement of Title IV rights through suits by union members. It was sharply criticized by dissenting members of the Committee as lacking "any effective enforcement procedure" because "the individual union member must shoulder the burden of litigation costs himself." H.R.Rep. No. 741, *supra* p. 93.

The role of the Secretary as "the union member's lawyer" precludes any claim of absolute discretion whether to bring suit or not. This role imposes on him

the obligation to protect the member's rights, and limits his discretion to that of a responsible lawyer.

Second, the Secretary is to serve as a screen "to protect unions from frivolous litigation and unnecessary judicial interference in their elections." *Trbovich* v. *United Mine Workers of America, supra,* at 532. By requiring that post-election suits to challenge an election be brought through the Secretary, Congress protected unions from the "unnecessary harassment" of multiple litigation by any union member who was dissatisfied with the outcome of the election and who alleged some technical violation.

The screening function, however, was intended to protect unions only from "frivolous" complaints—those which lacked substance in fact, or which were technical violations not affecting the outcome of the election. The screening function was not intended to shield unions from meritorious complaints of substantial violations. The Secretary must exercise judgment as to whether the claimed violations can be substantiated in court and whether they may have affected the outcome of the election. But the exercise of that judgment does not require nor carry with it the uncontrolled discretion asserted by the Secretary.

The Petitioner contends that to subject the Secretary's refusal to sue to judicial scrutiny would effectively result in exposing the union to multiple and frivolous litigation. This wholly misconceives the proceedings involved. The action is brought against the Secretary, not against the union.[5] The evidence focuses

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[5] The union was joined in the present case because the complaint also alleged that the union had violated its duty to protect the plaintiff's rights under Title IV and had breached its duty of fair representation. App. 6A, paragraph 21.

on what the Secretary has done, not what the union has done. And the question is whether the Secretary has acted arbitrarily or not in accordance with law. Nor will there be multiple litigation, for judicial review of the Secretary's refusal to sue can be accomplished in a single proceeding.

Third, the Secretary's suit serves to consolidate in a single proceeding all meritorious complaints challenging the validity of an election. *Trbovich* v. *United Mine Workers of America, supra,* 404 U.S. at 532. In the words of Professor Cox, "An election is an integer. Its validity should be adjudicated once and for all in one forum." Hearings on S.505, *supra,* p. 135. All complaints concerning the conduct of an election are filed with the Secretary. He consolidates all of the complaints in a single investigation, determines whether the cumulative effect of the substantiated violations may have affected the outcome of the election, and brings a single suit to set the election aside.

The consolidation function of the Secretary does not require, nor is in any way advanced by, absolute discretion in the Secretary to refuse to bring suit. The fact that the Secretary's single suit will enforce multiple rights can in no way justify the Secretary's claim that he has absolute discretion not to enforce those rights. On the contrary, it would seem that when the whole fabric of democratic rights guaranteed by Title IV depends on the Secretary's decision to bring a single suit, that decision should not be immune from judicial scrutiny.

C. *The Mandatory Language And Intent of Congress*

The words of Section 402(b) are not permissive but impose a positive mandate on the Secretary. *Ferry* v. *Udall,* 336 F.2d 706 (C.A.9), certiorari denied, 381 U.S. 904. That section provides that when a union member has properly filed a complaint with the Secretary under Section 402(b)—

> "The Secretary *shall* investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he *shall,* within sixty days after the filing of such complaint bring a civil action . . . to set aside the invalid election. . ." (emphasis supplied).

This mandatory wording stands in contrast to the permissive wording of Section 210, which provides that whenever it appears any person has violated any provision of Title II "the Secretary *may* bring a civil action for such relief . . . as may be appropriate." (emphasis supplied) [6] This suggests that the choice of mandatory rather than permissive words in Section 402(b) was deliberate.

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[6] The wording of Section 402(b) directing that the Secretary "shall . . . bring an action" also stands in contrast with the wording of Section 10(b) of the National Labor Relations Act, which provides that the National Labor Relations Board, with the General Counsel acting on its behalf, "shall have power to issue . . . a complaint." Furthermore, *Vaca* v. *Sipes,* 386 U.S. 171, recognized the intolerability of giving the General Counsel unreviewable discretion to foreclose individual rights. 386 U.S. 182, and denied to the General Counsel control over whether a suit to enforce those rights should be brought. The lower court decisions holding that the General Counsel's refusal to issue a complaint is not reviewable has been sharply criticized. K. Davis, ADMINISTRATIVE LAW TREATISE (1970 Supplement) 969, 982-90; L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965) 360, 375. The reviewability of the refusal of the General Counsel to act has not yet been ruled on by this Court, *Amal. Ass'n Street, Elect. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 305, n.2 (Dissenting opinion of Mr. Justice Douglas).

Throughout the legislative history, the Secretary's responsibility under Section 402(b) was described in committee reports and floor debates in mandatory terms, either repeating or paraphrasing the statutory language.[7] Congress did not merely authorize but directed him to bring suit. Congress did not contemplate that he *might* bring suit, but that he *would* bring suit. In the words of Senator Kennedy, "we expect him to enforce this Section." 104 Cong. Rec. 10947.

Congress, of course, did not intend that the Secretary should be an automaton without any scope for exercise of judgment in determining whether to bring suit to set aside an election. First, he is to bring suit "if he finds probable cause to believe a violation has occurred." He has a range of judgment in weighing the evidence and predicting the likelihood of success in litigation. Second, even though violations have occurred, he is not required to bring suit unless he finds probable cause to believe that they "may have affected the outcome of the election" and the election can be set aside under Section 402(c).[8] Again, the Secretary

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[7] "The Secretary is directed to investigate . . ." S. Rep. No. 1684, 85th Cong., 2d Sess., 7 (1958). "The Secretary is to investigate and . . . is to institute a suit." S. Rep. No. 1684, *supra*, p. 37. "The Secretary must investigate complaints . . . he shall . . . institute an action . . ." S .Rep. No. 187, 86th Cong., 1st Sess., 48 (1959). "The Secretary will investigate each such complaint and and . . . he will bring a civil action." Conf. Rep. H.R. No. 1187, 86th Cong., 1st Sess., 35 (1959). "the Secretary must investigate such a complaint . . . he must . . . bring a civil action." Statement of Senator Goldwater, 105 Cong. Rec. 19765.

[8] This exception to the Secretary's obligation to bring suit where violations had occurred was expressly recognized in various committee reports. S. Rep. No. 1684, 85th Cong., 2d Sess., 7 (1958); S. Rep. No. 187, 86th Cong., 1st Sess., 21 (1959).

has a range of judgment in projecting whether the violations he will be able to prove will, in the aggregate, be sufficient to invalidate the election.

Nowhere in the legislative history is there any suggestion that the Secretary was to exercise discretion in bringing suits under Title IV beyond determining whether there was probable cause that violations had occurred and whether those violations may have affected the outcome of the election. There is not the slightest hint that the Secretary could properly refuse to bring suit for other reasons. The consistent purpose of both those who advocated enforcement of Title IV rights through suits by the Secretary and those who sought enforcement through suits by union members was to design the most effective way of insuring these basic democratic rights. See H.Rep.No. 741, *supra,* p. 79. It is beyond belief that either group would have tolerated, much less intended, to give the Secretary unreviewable discretion whether to protect those basic rights or not.

II

Judicial Scrutiny of the Secretary's Refusal to Sue Is Necessary for Title IV to Fulfill Its Purpose

The pervading premise of the Act is that "there should be full and active participation by the rank and file in the affairs of the union." *American Federation of Musicians* v. *Wittstein,* 379 U.S. 171, 183. That full and active participation can be achieved only through democratic procedures and is achieved only to the extent that union members make use of those democratic procedures.

"Title IV's special function in furthering the overall goals of LMRDA is to insure free and democratic

elections," *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463, 470. But the ultimate purposes of Title IV are achieved only when union members who are dissatisfied with the policies and leadership of their unions exercise their rights to nominate and support candidates, campaign for union office, distribute campaign literature and encourage members to vote.

The decision of the Secretary whether to bring suit to challenge an election plays a pivotal role in encouraging or discouraging use of these democratic processes. Lack of confidence in the fairness of the Secretary's decision not to bring suit can totally destroy the member's desire to use these processes. An examination of the nature of contested elections will quickly make plain why this is so.

Union election contests, when they occur, are often bitter struggles,[9] particularly in those cases which result in a complaint being filed with the Secretary. Dissatisfied union members do not lightly challenge incumbent officers, for the incumbents have the advantage of control of the union's administrative structure, its official publications, and often its election machinery.[10] The challengers must build a competing organi-

[9] The bitterness of contested elections and the obstacles confronting challengers to incumbent offices in the Steelworkers Union is delineated in Herling, RIGHT TO CHALLENGE (1972). See also Ass'n for Union Democracy, UNION DEMOCRACY IN REVIEW, 1959-72 (1974); F. Cormier and W. Eaton, REUTHER (1970) Ch. 17-18; R. James & E. James, HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER (1965).

[10] S. Lipset, M. Trow, J. Coleman, UNION DEMOCRACY (1956) Ch. 1; D. Bok and J. Dunop, LABOR AND THE AMERICAN COMMUNITY (1970) 73, 84-5; Summers, *Judicial Regulation of Union Elections,* 70 Yale L.J. 1221, 1226-30 (1961).

zation, collect money for campaign literature and other expenditures, and make themselves known to the other members. The challengers and their supporters may be subject to reprisals ranging from loss of jobs to physical violence. *Union Elections And The LMRDA: Thirteen Years of Use And Abuse,* 81 Yale L.J. 407, 444-8 (1972). Their willingness to undertake these burdens and risks depends in substantial part on their confidence that the rights guaranteed by Title IV will be protected and that they will have a fair and democratic election. Even though defeated, the challengers may hold together their organization with the hopes of doing better in future elections, particularly if their experience gives them confidence that future elections will be fair and democratic.

After an election, defeated candidates are often reluctant to file complaints with the Secretary, even though they believe that their defeat was the result of violations of Title IV. Union members resent another member's resorting to an outside tribunal to resolve internal problems.[11] By filing a complaint he may alienate supporters and invite attacks by those declared elected, thereby reducing his effectiveness in the union's political process. He will appeal to the Secretary only if the prospect of obtaining help outweighs these political risks.[12]

[11] *Union Elections, supra,* p. 483, n. 335; Summers, *Disciplinary Powers of Unions,* 3 Ind. & Lab. Rel. Rev. 483, 503 (1950); *NLRB* v. *Industrial Union of Marine and Shipbuilding Workers,* 391 U.S. 418.

[12] The number of frivolous complaints are relatively small. In two-thirds of all complaint cases the Department finds that it has jurisdiction and that violations have occurred, and in more than forty percent of the cases finds that those violations may have affected the outcome of the election. U. S. DEPT. OF LABOR, UNION

If the Secretary obtains voluntary compliance with a supervised rerun,[13] or brings suit to set aside the election, the challenger will recoup much or all the political cost of filing the complaint. The action of the Secretary legitimizes his contentions that democratic rights have been violated and enables him to hold his support among the membership. If the case is brought to trial, the nature and scale of violations will be revealed, responsibility for those violations will be established, and their repetition will be discouraged. Even though the suit does not succeed, the voting strength of the candidates will be more reliably measured and continued engagement in the political process encouraged.

If the Secretary refuses to bring suit, the political future of the challenger is inevitably damaged, but if the Secretary's refusal is seen by the union members as justified, it will not discourage them from future participation in the union's political life, or deter them from running for office or supporting opposition candidates when they believe they can win in a fair and democratic election.

However, if union members believe that the Secretary's refusal to sue is not justified, then the political

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ELECTION CASES UNDER THE LMRDA, 1966-70, p. 6. Many complaints are dismissed on jurisdictional grounds so the number in which there is a finding that no violations have occurred is slightly more than two percent. *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407, 571 (1972).

[13] The Secretary may use the threat of a suit to induce voluntary union compliance and correction. Settlements take the form of Formal Determinations which normally entail a voluntary rerun of the election under the supervision of the Labor Department. *Union Elections, supra*, p. 492-6.

process is permanently blighted. Struggles to unseat incumbent officers are seen as quixotic when there is no guarantee of a fair election; and criticism of union officers loses its purpose when a majority cannot remove them. Appealing to the Secretary for protection of democratic rights is seen as carrying more risks than prospects of protection.

The critical requirement is confidence in the Secretary's decision. It is not enough that his decision be justified, it must be seen as being justified. Confidence in the Secretary's decision is undermined by three factors:

First, the decision whether to sue is made in a meeting in which the complainant cannot participate and is based on investigative reports which he has not seen and which he cannot supplement.[14] He does not know the considerations weighed nor have a voice in the decision.

Second, the complainant is never more than cursorily informed of the reason for the decision not to sue. At most, the letter notifying him of the decision will list the violations found with the conclusory statement that "there is not probable cause to believe that the violations found may have affected the election outcome." But half of the letters are not even this revealing, merely stating that the case "is not suitable for litigation," without indicating what, if any, violations

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[14] The decision is made jointly by the Solicitor of Labor and the Assistant Secretary of Labor-Management Relations based on recommendations submitted by area and regional offices. *Union Elections, supra*, p. 497.

were found or what made the case "not suitable for litigation."

Third, there is a common perception among complainants that political influence is brought to bear to forestall litigation, and that there is a systematic bias in favor of incumbents because the Department depends upon good relations with union officials to deal with them on other matters.[15] This perception is enhanced by the belief that the two officials who make the decision, the Solicitor of Labor and the Assistant Secretary for Labor-Management Relations are particularly susceptible to influence by union officials.[16]

The lack of confidence growing from these three factors is confirmed and hardened by the Secretary's adamant insistence that his decision not to sue is immune from judicial scrutiny. From the perspective of union members, why should the Secretary be unwilling to justify his decision if he has good reasons for that decisions? Why does he resist an inquiry by the court into whether his decisions is arbitrary or not in accordance with law? What is it that he is afraid to disclose? What is it that he is afraid he cannot justify? Again from the perspective of union members, how can an official be relied upon to protect their rights

[15] *Union Elections, supra,* p. 797-8. The number of letters using the "affected the outcome" formula and the number using the "not suitable for litigation" formula are shown in Appendix B, p. 571.

[16] *Union Elections, supra,* p. 499-500. This perception is shared by both attorneys for Title IV complainants and union counsel, and by some regional staff members of the Department of Labor. *Id.* n. 418.

[17] D. Bok and J. Dunlop, LABOR AND THE AMERICAN COMMUNITY, 406-8 (1970).

when he insists that he is accountable to no one when he refuses to protect those rights?

To fulfill the purposes of Title IV of encouraging the exercise of democratic rights, those who appeal to the Secretary to protect those rights must have confidence in his decisions. It is not enough that the Secretary's decisions not to sue can be justified; there must be confidence in union members that they are justified. Confidence in his decisions can be established only if they are subject to judicial scrutiny, and union members can obtain from a court assurance that his refusal to proceed on their behalf is not arbitrary and is in accordance with law.

CONCLUSION

The simple question presented here is whether the Secretary, charged by Congress with protecting basic democratic rights of union members and guaranteeing to union members and the public fair and democratic elections, has unreviewable discretion to refuse to protect those rights. The Secretary asserts he has this uncontrolled power; that he can deny union members enforcement of their statutory rights and be answerable in no court of law. Our history demonstrates that no official, high or petty, can be safely entrusted with such power, and the path of the law has been toward making officials accountable for their actions. Congress, in making the Secretary's suit the exclusive remedy for protecting Title IV rights, did not act contrary to that wisdom and the course of the law. Congress expected the courts to assure union members and the public that the Secretary in refusing to sue acted reasonably and not arbitrarily, that he acted within the law and not beyond the law.

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